(12)

No. 94-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMERICAN DEPOSIT CORP., BLACKFEET NATIONAL BANK, AND INDEPENDENT BANKERS ASSOCIATION OF TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

These amici curiae adopt the statement of the question presented by petitioner.

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American Deposit Corp., Blackfeet National Bank, and Independent Bankers Association of Texas file this brief as amici curiae pursuant to written consents of the petitioner and respondents which have been lodged with the Clerk.

I. INTEREST OF THE AMICI CURIAE

Amicus American Deposit Corp. ("ADC") owns and licenses to banks, including national banks, a new proprietary banking product called the "Retirement CD."™ In highly simplified form, the Retirement CD

works as follows: The customer deposits money with the bank and selects a "maturity date" in the future—normally the customer's anticipated retirement date. The deposited funds are booked as deposits and are used in the bank's normal operations, and FDIC insurance premiums are paid on them. Interest accumulates and is added to the account until the maturity date, at which time the depositor may withdraw up to two-thirds of the account balance. Thereafter, the depositor receives monthly (or other periodic) payments for life, their amount being determined with reference to mortality tables and an interest rate. The depositor is assured of receiving withdrawals totaling the amount of the maturity balance; if he dies before doing so, his estate or designated beneficiary is paid the remaining amount.

The Office of the Comptroller of the Currency ("OCC"), the regulatory agency for national banks, has confirmed that national banks have authority to issue the Retirement CD under their *express* statutory powers under the National Bank Act, 12 U.S.C. § 24, to accept deposits and fund their operations,[1] and the Federal Deposit Insurance Corporation ("FDIC") has ruled that the Retirement CD qualifies as an insured deposit under the Federal Deposit Insurance Act.

While the Retirement CD is an attractive product for all banks, it is of particular value to small community banks, for it provides them with a much-needed source of stable long-term deposits from which the credit needs of local business and community development can be met. Amicus Blackfeet National Bank, a small national bank in Browning, Montana, on the Blackfeet Indian Reservation owned by the

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[1] The Retirement CD is thus *not* a mere "incidental power" of national banks. See *NationsBank* v. *VALIC*, 115 S.Ct. 810, 814 n.2 (1995) (hereinafter "*NationsBank*").

Blackfeet Indian Tribe and its members, is one of ADC's licensees. Amicus Independent Bankers Association of Texas is an association of approximately 800 independent community banks in Texas. Its wholly-owned subsidiary, IBAT Services, Inc., has licensed the Retirement CD for its members.

Life insurance companies have long issued annuities as well as writing life insurance.[2] Until recently, however, for life insurance companies annuities were a sideline to their insurance business (along with other sidelines such as lending money, *NationsBank*, 115 S.Ct. at 815). See, *e.g.*, 1 APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE § 81, at 285-86 (1981) ("The volume of insurance written annuities is presently negligible."). Of late, however, issuing annuities has become important to the life insurance industry because their traditional central

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[2] Many other entities besides life insurance companies have long issued annuities. Governments have issued them since the Middle Ages; the famous British "Consols" (short for "Consolidated Annuities") formed the larger part of the British government's funded debt until World War I. The beginning of modern banking with the founding of the Bank of England in 1694-95 was intimately associated with annuities: the Bank's original capital was a subscription to a government annuity. See HOMER & SYLLA, A HISTORY OF INTEREST RATES 75–76, 101, 108, 112, 128, 135, 150, 159-62 (3d ed. 1991). Eleemosynary institutions have issued annuities at least since the 1830s, when the American Bible Society began its planned giving program. 141 CONG. REC. S9306 (June 28, 1995) (speech of Senator Hutchison of Texas in support of S. 978, the Charitable Giving Protection Act of 1995). There exists an association called the American Council on Gift Annuities, numbering in its membership such entities as United Way of America, the Salvation Army, Vassar College, the General Conference of Seventh-Day Adventists, the Southern Baptist Convention, and some 1500 other charities, which issue annuities in the hundreds of millions of dollars each year. *Ibid.*; and see *Charities That Offer Gift Annuities Catch Flak for Uniform Rates*, WALL ST. JOURNAL, October 5, 1995, p. A1.

business has declined in attractiveness. "People are living longer . . . and consumers' concerns have shifted from death at a young age to death at such an old age that savings might be exhausted. Thus sales of annuities, which promise a stream of future payments as long as you live, are growing rapidly while sales of new life policies with an investment feature are stagnant." *Could This Be You? That's the Pitch, As Insurers Revive Focus on Death,* NEW YORK TIMES, September 28, 1995, D1; see also *Retired, Finally, But Still Saving for Tomorrow,* NEW YORK TIMES, October 1, 1995, 1 at 11.

The Retirement CD has obvious annuity features and is competitive with annuities issued by life insurance companies. The life insurance industry has accordingly fought it bitterly. Three different state insurance commissioners (those of New Mexico, Illinois, and Florida) have attacked ADC's national bank licensees, asserting that solicitation or acceptance of Retirement CD deposits from their citizens constituted violations of their insurance codes. Their argument has been that under their state laws the Retirement CD is an annuity; that under those laws only insurance companies can issue annuities; and that the "reverse preemption" of McCarran-Ferguson therefore enables them to forbid national banks from engaging in this activity even though the Comptroller of the Currency has confirmed that it is authorized under the express powers conferred by the National Bank Act.

In each case, ADC and the affected national banks filed suit under 42 U.S.C. § 1983 to put an end to the state insurance commissioners' interference with the banks' federally secured rights, contending *inter alia* that as an authorized activity under the express powers of the National Bank Act, the Retirement CD cannot be prohibited or regulated by the states, and that McCarran-Ferguson does not reverse this preemption

because "the business of insurance" under McCarran-Ferguson does not include the business of issuing annuities. After this Court's decision in *NationsBank* v. *VALIC,* 115 S.Ct. 810 (1995), the New Mexico authorities recognized that annuities are not "insurance" within the meaning of McCarran-Ferguson and consented to judgment against them. *First National Bank of Santa Fe* v. *Chavez,* CIV 94-1272 JB/WWD (D. N.M.). The Illinois case, *American Deposit Corp.* v. *Schacht,* 887 F. Supp. 1066 (N.D. Ill. 1995) (magistrate judge's opinion) is on appeal in the Seventh Circuit (7th Cir. No. 95-2462). The Florida case, *Blackfeet Nat'l Bank* v. *Nelson,* No. TCA 94-40496-WS (N.D. Fla. Aug. 8, 1995), is under petition for reconsideration.[3]

Amici thus have a direct and immediate interest in several questions presented by the case at bar. In addition, we will invite the Court's attention to two matters that we respectfully submit should be kept in mind in drafting the opinion in the case at bar.

II. SUMMARY OF ARGUMENT

Amici support the principal arguments of petitioner herein. Amici further urge that the Court recognize that notwithstanding the apparently all-embracing language of McCarran-Ferguson, there are some areas of federal legislation that Congress cannot conceivably

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[3] See also *Blackfeet National Bank* v. *Rubin* (D.C.Cir. No. 95-5206), involving a Treasury rulemaking proceeding proposing to deprive the Retirement CD of tax-deferred status during the accumulation phase, thus crippling its ability to compete with insurance-company-issued annuities. That case involves major issues of ripeness for review and the propriety of *ex parte* contacts by the life insurance industry but does not raise questions relevant to the case at bar. On November 2 the court of appeals denied rehearing *en banc* of its affirmance of dismissal on ripeness grounds. Blackfeet and ADC have not decided whether to file a petition for certiorari.

have intended to turn over to the states and that the National Banking Act is one of these. Amici also urge that the Court put an end to the argument that the test for whether a practice falls within the "business of insurance" which it enunciated in *Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 129 (1982), is limited to antitrust cases. Finally, amici note that the questions (a) whether annuities are "insurance" for McCarran-Ferguson purposes, and (b) whether national banks may issue annuities (as opposed to selling annuities issued by others) are not involved in the case at bar and that nothing need be said in any opinion herein that could be interpreted as passing on those questions.

III. ARGUMENT

A. Amici Support Basic Arguments of Petitioner

Amici of course support the proposition that states cannot preclude or impede the exercise by national banks of powers Congress has expressly conferred on them.

Amici also support the proposition that a state statute that forbids engaging in an activity is not a statute "regulating" that activity.

B. McCarran-Ferguson Should Not Be Read To Authorize State Preemption of the National Bank Act

We submit that, notwithstanding the sweeping language of McCarran-Ferguson, Congress could not have really intended to allow the states to preempt *every* federal statute that does not "specifically relate [ ] to the business of insurance." There are statutes that deal with matters of such "paramount importance," *Moore* v. *National Distillers and Chemical Corp.,* 143 F.R.D. 526, 534 (S.D.N.Y. 1992) (magistrate judge's decision), to the national interest that Congress cannot conceivably have meant to turn them over to the states.

The Civil Rights Act of 1964 does not "relate to insurance"; but could a state's insurance code really be allowed to override it? *Compare Spirt* v. *Teachers Ins. and Annuity Assoc.,* 691 F.2d 1054, 1065 (2d Cir. 1982), *with NAACP* v. *Family Mut. Ins. Co.,* 978 F.2d 287, 299 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2335 (1993). Or the Civil Rights Act of 1866? *Cf. Ben* v. *General Motors Acceptance Corp* 374 F. Supp. 1199 (D. Colo. 1974). Could a state authorize a domestic company to insure enemy vessels in wartime notwithstanding the Trading With the Enemy Act? Surely not. And see *Moore* v. *National Distillers and Chemical Corp., supra* (though Foreign Sovereign Immunities Act nowhere relates to business of insurance, McCarran-Ferguson preemption inapplicable in view of paramount importance of U.S. foreign policy concerns embodied in the FSIA).

We submit that the National Bank Act is such a statute, and that the Eighth Circuit was correct in holding that McCarranFerguson preemption should not be applied to it, because the longstanding exclusive federal regulation of national banks prior to McCarran-Ferguson "strongly indicates that Congress did not intend the 'business of insurance' to encompass lawful activities of national banks." *First Nat. Bank of Eastern Arkansas* v. *Taylor,* 907 F.2d 775, 780 (8th Cir. 1990).

C. The *Pireno* Test Is Not Limited to Antitrust Cases

The brief of respondent Insurance Agents in opposition to the petition suggested, at p. 8, that the familiar threefold test for whether a practice is part of the "business of insurance" which this Court articulated in *Union Labor Life Ins. Co.* v. *Pireno,* 458

U.S. 119, 129 (1982),[4] is somehow limited to antitrust cases, citing *United States Dep't of the Treasury* v. *Fabe*, 113 S. Ct. 2202 (1993). (The insurance agents have previously advanced this argument in litigation over the Retirement CD.) But this is not what *Fabe* held. *Fabe* simply pointed out that a statute is "enacted for the purpose of regulating the business of insurance" if it "possesses the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210. Holding that the performance of an insurance contract passes the *Pireno* test and therefore is part of the business of insurance, *id.* at 2209, the court concluded that therefore a statute "aimed at protecting or regulating such performance was a law enacted for the purpose of regulating the business of insurance." *Id.* at 2210. The Ninth Circuit expressly rejected the Insurance Agents' argument in *Merchants Home Delivery Service, Inc.* v. *Reliance Group Holdings, Inc.*, 50 F.3d 1487, 1490 (9th Cir. 1995). See also *Stephens* v. *American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) (*Pireno* applied in non-antitrust action); *Kenty* v. *Bank One Columbus, N.A.*, No. 93-4211 (6th Cir. Oct. 25, 1995), 1995 Fed. App. 316 (same).

D. Miscellaneous Points

Finally, we respectfully invite the Court's attention to two points that have arisen in the Retirement CD litigation but are not here involved, so as to ensure that the Court's opinion in this case will not inadvertently appear to decide them.

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[4] "[*F*]*irst*, whether a practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry."

1. Annuities Are Not Insurance.

Whether annuities fall within the "business of insurance" is of course central to the question of McCarran-Ferguson and the Retirement CD. In the view of ADC and its licensees, it is plain that (absent a special statutory definition) annuities were not deemed "insurance" when McCarran-Ferguson was passed and are not so deemed today. Besides this Court's opinion in *NationsBank, supra*, 115 S. Ct. at 815, quoting with approval the categorical statement of the standard treatise that "Annuity contracts must . . . be recognized as investments rather than insurance," 1 APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE § 84 (Rev. ed. 1981), there are literally scores of cases to this effect, going back well into the nineteenth century. We will not burden this short brief with citations[5] but will simply repeat that there is no need to touch on this matter in the opinion in the case at bar.

2. Bank as Agent Versus Bank as Issuer.

The Court's footnote in *NationsBank*, 115 S.Ct. at 815 n.4,[6] has been cited in briefs in the Retirement CD litigation as if it showed the Court's disapproval of any issuance of annuities by banks as principal. We think that this is an overreaching misconstruction and that the Court plainly was merely noting that the issuance of annuities by the bank as a principal was simply not involved in that case, which dealt with the bank's acting

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[5] A large collection of cases will be found in the cited section of APPLEMAN, as well as in, *e.g.*, 19 COUCH ON INSURANCE 2D § 81:2 (Rhodes ed. 1983), and 3A C.J.S. *Annuities* § 3c.

[6] "Assuring that the brokerage in question would not deviate from traditional bank practices, the Comptroller specified that NationsBank 'will act only as agent, . . . will not have a principal stake in annuity contracts and therefore will incur no interest rate or actuarial risks.' Comptroller's Letter 48a."

as agent or broker to *sell* annuities issued by others, just as the case at bar deals with the bank's acting as agent to sell insurance policies. We respectfully suggest that the Court bear this misconstruction in mind in framing any discussion of bank agency in the case at bar.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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